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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/643,006	08/18/2003	Eric G. Lovett	GUID.060PA	2975

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EXAMINER

NGUYEN, HUONG Q

ART UNIT	PAPER NUMBER
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3736

DATE MAILED: 04/20/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/643,006

Applicant(s)

LOVETT ET AL.

Examiner

Helen Nguyen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 1 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 August 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-85 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☐ Claim(s) _____ is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☒ Claim(s) 1-85 are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Election/Restrictions

1. This application contains claims directed to the following patentably distinct species:

Species 1, directed to a method/apparatus using a sensor to detect patient activity, wherein the sensor is either:

- (A) An accelerometer, drawn to **Claims 4, 52**
- (B) A (transthoracic) respiration sensor, drawn to **Claims 5, 53**;

Species 2, directed to a method/apparatus using a sensor to sense muscle tone, Wherein the sensor is either:

- (A) an electromyogram sensor, drawn to **Claims 7, 35, 55**
- (B) a strain gauge sensor, drawn to **Claims 8, 36, 56**
- (C) a mechanical force sensor, drawn to **Claims 9, 37, 57**;

Species 3, directed to a method of classifying sleep states, wherein the classifying is done either:

- (A) in a batch mode, drawn to **Claims 16, 38**
- (B) on a real-time basis, drawn to **Claims 17, 39**;

Species 4, directed to a method/apparatus of providing sleep informed therapy comprising:

- (A) respiratory therapy, drawn to **Claims 19, 68**
- (B) cardiac therapy, drawn to **Claims 20, 67**
- (C) preventive therapy, drawn to **Claim 21**;

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Species 5, directed to a method/apparatus of classifying sleep states comprising:

- (A) diagnostic testing, drawn to **Claims 22, 71, 77**
- (B) testing of therapy parameters, drawn to **Claims 23, 70, 78**
- (C) monitoring the patient, drawn to **Claims 24, 42, 84;**

Species 6, directed to a method of determining physiological responses comprising either:

- (A) intrinsic responses, drawn to **Claims 26, 44**
- (B) evoked responses, drawn to **Claims 27, 45;**

Species 7, directed to an apparatus, wherein the muscle tone sensor is mechanically coupled to either:

- (A) a header of an implantable cardiac device, drawn to **Claim 59**
- (B) a housing of an implantable cardiac device, drawn to **Claim 60**
- (C) a lead system of an implantable cardiac device, drawn to **Claim 61.**

2. The subspecies of each species are independent or distinct because each involves a different mode of operation and thus, constitutes distinct subject matter.

3. Applicant is required under 35 U.S.C. 121 to *elect one (A, B, C) of EACH of the seven species (1-7)* for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, **Claims 1, 31, 48, 75, and 81** are generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable

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thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

4. A telephone call was made to Mark A. Hollingsworth on 4/5/2006 to request an oral election to the above restriction requirement, but did not result in an election being made.

5. Applicant is advised that the reply to this requirement to be complete must include (i) an election of a species or invention to be examined even though the requirement be traversed (37 CFR 1.143) and (ii) identification of the claims encompassing the elected invention.

The election of an invention or species may be made with or without traverse. To reserve a right to petition, the election must be made with traverse. If the reply does not distinctly and specifically point out supposed errors in the restriction requirement, the election shall be treated as an election without traverse.

Should applicant traverse on the ground that the inventions or species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the inventions or species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C.103(a) of the other invention.

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6. Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen Nguyen whose telephone number is 571-272-8340. The examiner can normally be reached on Monday - Friday, 8 am - 5 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Max Hindenburg can be reached on 571-272-4726. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

HQN
4/5/2006



MAX E. HINDENBURG
PATENT EXAMINER
EBC CENTER 3700

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